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No. 71-397

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

CAPITAL ELECTRIC POWER ASSOCIATION, ET AL.,
Petitioners,

v.

FEDERAL POWER COMMISSION and
MISSISSIPPI POWER & LIGHT COMPANY

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

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In its Brief In Opposition, the Federal Power Commission erroneously argues that the case involves only the proper interpretation of a contractual provision and is not of general importance. What is involved is, of course, the correct interpretation of Section 205 of the Federal Power Act (16 U.S.C. 842d). This is made clear by the discussion in the Commission Brief in support of its argument and in the Brief For Mississippi Power & Light Company (MP&L) In Opposition. Those

Briefs disclose that all parties agree that the contract provides for the payment for electric power and energy in accordance with a specified rate schedule attached to and made a part of the contract, "or such other effective superseding rate schedule as may be authorized by duly constituted regulatory authority." Thus, if this Court accepts the case for review, its basic decision will not involve the interpretation of contractual language, but will require a determination as to whether or not the Commission under Section 205 of the Act "authorizes" a superseding rate schedule which becomes effective as the result of its being filed with the Commission under that Section.

A substantial portion of both the Commission and the MP&L Briefs represent an attempt to establish that the Commission does "authorize" the taking effect of new rate schedules (Comm. Br. 4-6; MP&L Br. 11-13), thus plainly indicating that the case primarily involves an interpretation of the Federal Power Act and not the meaning of contractual language. There can be no dispute as to the meaning of the language used in the contract once the intent of the Act is established.

As to the argument that the case is not of general importance, we point out that the misinterpretation by the Commission and the Court of Appeals of the decisions in *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956), *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *United Gas Pipe Line Company* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958) seriously frustrates the proper administration of the Federal Power Act and also represents a serious threat to the success of the Federal Rural Electrification Administration created by Congress. It is respectfully submitted that many small, mostly consumer-owned, electric distribution systems may be seriously injured and perhaps even forced out

of business if the wholesaling, large utilities are permitted unilaterally to raise rates merely by filing the notice required by Section 205(d) of the Act in instances in which the wholesale contracts contain language similar to that involved here, which language was never intended to permit such unilateral increases.

The Commission contends that "Petitioners erroneously equate (Pet. 10-12) Commission authorization with Commission approval of rate increase filings under Section 205 of the Act" (Comm. Br. 5). There is no basis for this charge. The Petition makes crystal clear that Petitioners' position is that *Mobile* and *Sierra* firmly establish that the Commission does not "authorize" a rate change which becomes effective as a result of a filing under Section 205(d) of the Act.

The Commission argues that when a rate filing is made under Section 205, the Commission can either reject it, suspend its effective date for up to five months, or permit it to become effective at the end of the notice period, and points out that the Commission's Regulations define the effective date of a new rate schedule as the date the schedule is "permitted by the Commission to become effective as a filed rate schedule" (18 C.F.R. 35.2(e)), and adds "Thus, in a very real sense, the Commission 'authorizes' the taking effect of new rate schedules." (Comm. Br. 5).

MP&L makes the same argument (MP&L Br. 11-13). Both agree that "permission" to become effective does not constitute approval of such rate schedule.

The answer to this argument is, of course, that Section 205 contains no reference whatsoever to the Commission "permitting" a rate schedule to become effective. The section merely provides for the seller giving thirty days' notice of the rate change by filing a copy thereof with the Commission. The rate change automatically becomes effective thirty days after the notice having

been given, unless the Commission suspends it pending a hearing.

The use of the word "permitted" in the Commission's Regulation defining the effective date cannot, of course, enlarge the authority of the Commission bestowed upon it by the Act, and a reading of the Regulation makes it clear that the Commission was not attempting to do so. In the Regulation quoted by the Commission and MP&L, there is added this sentence: "The effective date shall be 30 days after the filing date, or such other date as may be specified by the Commission." Obviously, "such other date" is required by the Act to be the date fixed by the Commission if the rate is suspended under Section 205(e) of the Act. The Regulation cannot possibly be used to bolster the argument that the Commission "authorizes" a rate under Section 205.

The complete answer to both the Commission and MP&L was given by this Court in *Mobile* and *Sierra*. In *Mobile* the Court made a most searching analysis of Sections 4 and 5 of the Natural Gas Act (15 U.S.C., Sections 717c and 717d). In *Sierra* it was pointed out that Sections 205(c), (d) and (e) and Section 206(a) of the Federal Power Act are substantially identical to Section 4(c), (d) and (e), and 5(a), respectively, of the Natural Gas Act. The Court further stated that the interpretation of the Natural Gas Act in *Mobile* was equally applicable to the Federal Power Act (350 U.S. 350, 351, 353).

In *Mobile* the Court explained:

> "The relationship of these sections thus affords no support to petitioners' characterization of § 4 (d) and (e) as establishing a rate-changing 'procedure' —a 'proceeding' before the Commission 'initiated' by a natural gas company filing a 'proposed' change. Section 4 (d) provides not for the filing of 'proposals' but for *notice* to the Commission of any 'change . . . made by' a natural gas company, and

> *the change is effected, if at all, not by an order of the Commission but solely by virtue of the natural gas company's own action.* If the purported change is one the natural gas company has the power to make, the 'change' is completed upon compliance with the notice requirement and the new rate has the same force as any other rate—it can be set aside only upon being found unlawful by the Commission. It is thus no more a 'proposed' rate than any other rate, all of which are equally subject to Commission review. Likewise, no 'proceeding' is 'initiated' by a § 4 (d) filing. A proceeding to review the new rate may be initiated under § 4 (e), but, if so, it is initiated by the Commission in the same manner as a proceeding under § 5 (a) to review any other rate, that is, upon complaint or its own motion." (350 U.S. 342). (Emphasis supplied.)

Thus, patently, the Commission does not "authorize" a changed rate filed under Section 205(d) of the Federal Power Act.

The Commission and MP&L also assert that there is no conflict between the decision below and the decisions of this Court and various Courts of Appeals and the Federal Power Commission cited in the Petition at pages 9-12 because the language in the contracts in those cases did not contemplate unilateral rate changes (Comm. Br. 6, MP&L Br. 8-10). This assertion assumes the answer to the issue presented here. Each of those cases follows *Mobile* and *Sierra* and, accordingly, the decision below is in conflict with them since, as demonstrated, the parties to the contracts involved here also could not have contemplated unilateral rate changes because, as held in *Mobile* and *Sierra*, the Commission does not "authorize" such changes when filed under Section 205(d) of the Act.

MP&L states that the applicable case in point is *Memphis* and that the language in the contracts in *Memphis* was substantially identical to the language in

the contracts involved here. MP&L further states that the language of these contracts falls squarely within the holding of *Memphis* (MP&L Br. 6, 9-10). This statement is patently in error, since in *Memphis* the contracts provided that the rates to be paid should be those contained in the existing rate schedule "or any effective superseding rate schedules on file with the Federal Power Commission", and that the agreement should be subject in all respects to such rate schedules and the General Terms and Conditions filed with the Federal Power Commission. There was no restriction whatsoever on the seller's right to file superseding rate schedules with the Commission. In the contracts involved here, for a superseding rate schedule to become effective, it must "be authorized by duly constituted regulatory authority."

The Commission charges that the Petitioners' reliance on *Shell Oil Co.* v. *Federal Power Commission*, 340 F.2d 1002 (CA 3) for the proposition that the Commission was required to hold a hearing on the issue of whether or not the increases were contractually supported was unfounded because of the different factual situation in *Shell* (Comm. Br. 6-7). The facts are that in the opinion in that case the Third Circuit categorically stated that it was incumbent upon the Commission to conduct

such a hearing when a protest is filed against accepting the rate for filing on the grounds of a contractual bar.

Respectfully submitted,

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